Supreme Court, U.S.
FILED

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

JOSEFA FUENTES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit is correct in its determination that a "harmless error" standard applies to a district court's failure to properly instruct on the essential elements of 18 U.S.C. 924(c)(1), which makes it a crime to use or carry a firearm during a drug trafficking crime, as interpreted by *Bailey v. United States*, ___ U.S. ___, 116 U.S. 501 (1995).

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

United States of America, plaintiff-appellee
Rolando Lopez, defendant-appellant
Josefa Fuentes, defendant-appellant

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Josefa Fuentes, respectfully prays that a Writ of Certiorari issue to review the published opinion of the United States Court of Appeals for the Ninth Circuit filed November 8, 1996 and amended December 10, 1996, affirming in part, reversing in part and remanding in part the conviction and sentence imposed on petitioner in the United States District Court for the Central District of California. A petition for rehearing was denied January 16, 1997.

OPINIONS BELOW

The citation of the opinion of which review is sought is *United States v. Lopez*, ____ F.3d ____ (Ninth Circuit, December 10, 1996) (No. 92-50145).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1).

The United States Court of Appeals entered its decision on January 16, 1997, upon denial of a petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 18 United States Code, Section 924(c)(1) states: "Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . crime, be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . .

The Fifth Amendment to the United States Constitution states in part: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Josefa Fuentes, together with her husband, Rolando Lopez, were indicted on October 29, 1991 in a multi-count indictment charging Ms. Fuentes with conspiracy, possession with intent to distribute a controlled substance, distribution of a controlled substance and two separate counts of using and carrying a firearm in relation to a drug trafficking crime. Both firearms charges were alleged to have been

committed on October 16, 1991. One firearms count concerned a handgun found in Ms. Fuentes' purse which was found in the seat of the automobile in which she was a passenger. The remaining firearms count concerned a handgun found in Ms. Fuentes' dresser drawer in her bedroom and a rifle found in a trash can outside Ms. Fuentes' home near where a group of people had been standing when the authorities arrived to search the home.

The jury returned guilty verdicts against Ms. Fuentes on all counts. The district court sentenced Ms. Fuentes to concurrent custodial terms of 63 months on the narcotics charges, a consecutive term of 60 months on one firearms charge, and a consecutive term of 240 months on the remaining firearms charge, for a total custodial sentence of 363 months.

The District Court had jurisdiction pursuant to 18 U.S.C. §3231. A Notice of Appeal was timely filed on February 19, 1991. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The Court of Appeals affirmed the conviction and sentence in a published opinion in *United States v. Lopez*, 37 F.3d 565 (9th Cir. 1994). This Court thereafter granted certiorari, vacated that opinion and remanded the case for reconsideration in light of *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995).

In a published opinion on remand, the three-judge panel of the Court of Appeals reversed Ms. Fuentes' conviction on the second firearms count, affirmed her convictions on the substantive narcotics count and the first firearms count, and remanded for re-sentencing on the conspiracy count. Although the three-judge panel affirmed the conviction and sentence on the remaining firearms charge, it noted that the jury instructions given on the "use or carry" element of the firearms charge were flawed. First, the Court noted that the

instructions failed to properly define "carry" in light of *United States v. Hernandez*, 80 F.3d 1253, 1258 (9th Cir. 1996), because to the extent that the instructions defined "carry," they did not advise the jury that carry connotes "immediately available for use" rather than merely "available to assist or aid," and that carry "consists of transporting the firearm on or about the person" rather than being merely in "proximity." The panel also acknowledged that the instructions improperly conflate the terms "carry" and "use" in violation of *United States v. Pimentel*, 83 F.3d 55, 59 (2nd Cir. 1996) and *United States v. Spring*, 80 F.3d 1450, 1466 (10th Cir. 1996). Finally, the panel ruled that to the extent the instructions defined "use," they contain no requirement of "active employment" in violation of *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995). In spite of these findings regarding the failure of the trial court to provide the jury with proper instructions, however, the Court applied a "harmless error review" to the improper jury instructions on the essential elements of the alleged offense, and held that the errors in the jury instructions were harmless. Petitioner respectfully maintains that the Court of Appeals' ruling is in conflict with the decision of this Court and of the Ninth and other circuits, and respectfully urges the Court to grant Certiorari to resolve such conflict.

SUMMARY OF ARGUMENT

The published opinion below concludes that a "harmless error" analysis applies to a trial court's failure to properly instruct on the essential elements of law pertaining to whether possession of a firearm is criminal and subject to a harsh custodial penalty. By so concluding, the court below misapplied the decisions of this Court, is in conflict with the decisions of this Court, the decisions of other circuits and the clear intent of Congress, and establishes an arbitrary and unjustified rule for review of the legality of the imposition of

the harsh terms of custody for convictions of section 924(c)(1).

The opinion below is in direct conflict with the decisions of this Court in *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310 (1995), *Carella v. California*, 491 U.S. 263 109 S.Ct. 2419 (1989), and *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995). The opinion is also in direct conflict with opinions from the Ninth and other circuits which hold that when proof of an element has been completely removed from a jury's determination, there can be no inquiry into what evidence the jury considered to establish that element, because the jury was precluded from considering whether the element existed at all. Finally, the opinion is in direct conflict with other courts of appeals which interpret and apply the opinion the Court in *Bailey* with respect to the correct application of the "carry" prong of section 924(c)(1).

A writ of certiorari is appropriate to resolve the conflict which exists between the opinion below and opinions of this Court, and to settle the conflict which now exists between this published opinion and opinions in the Ninth and other circuits.

If the published opinion of the Ninth Circuit remains viable, the decision will result in a gross disparity between the federal circuits in the application of the extremely harsh five- and twenty-year penalty provisions of section 924(c)(1) to first time offenders.

REASONS FOR GRANTING THE WRIT

The published opinion below is in direct conflict with the United States Supreme Court decisions in *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310 (1995), *Carella v. California*, 109 S.Ct. 2419 491 U.S. 263 (1989) and *United States v. Bailey*, ___ U.S. ___, 116 S.Ct. 501 (1995). In

addition, the ruling is in conflict with the reported decisions of other circuit courts of appeals.

In *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310 (1995), this Court held that it was *per se* reversible error for a trial court to instruct a jury that the materiality element of the crime of making a false statement was established as a matter of law. The Court determined that such action on the part of the trial court deprived a defendant of the right to demand that a jury find him or her guilty of all of the elements of the crime charged. This Court has ruled that in the context of a failure to properly instruct a jury on the elements of an alleged offense, a failure to instruct on a necessary element of the offense cannot be harmless unless a review of the facts found by the jury establishes that the jury necessarily found the omitted element. *Carella v. California*, 491 U.S. 263 (1989). The opinion below is in direct conflict with *Carella*.

The opinion below is also in direct conflict with this Court's decision in *Bailey v. United States*, ___U.S. ___, 116 S.Ct. 501 (1995), which sets forth the required material elements for the offense of "carrying" a firearm in relation to a drug trafficking crime.

The opinion below is also in direct conflict with the reported decisions of the Ninth and other circuits. The sixth and tenth circuits have observed that *Bailey* "provides some guidance regarding the correct application of the 'carry' prong of section 924(c)(1)." *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996); *United States v. Spring*, 80 F.3d 1450, 1464 (10th Cir. 1996). These decisions note that *Bailey* suggests that neither storage nor possession of a gun, without more, satisfies the "carry" prong of § 924(c)(1). In *Riascos-Suarez*, 73 F.3d at 623, the sixth circuit defined carrying as requiring that "the firearm . . . be immediately available for use-on the defendant or within his or her reach."

In *United States v. Spring*, 80 F.3d 1450 (10th Cir. 1996), unlike in the present case, the tenth circuit decided the appeal under a "plain error" standard of review. *Id.* at 1464. Nevertheless, the court reversed the conviction, as the trial court's incomplete instruction on the term "carry" was determined to constitute plain error. *Id.* at 1466. In so doing, the tenth circuit quoted a passage from the sixth circuit's opinion in *United States v. Moore*, 76 F.3d 111, 113 (6th Cir. 1996):

> Our pre-*Bailey* definition of "use" was so broad that neither party had a reason to focus on the factual issues relevant to the "carry" prong, i.e., immediate availability and physical transportation. More important, the evidence and jury instructions allowed the jury to convict even if it believed that there was no gun within Moore's reach, or that Moore had not physically transported any gun during and in relation to his drug-trafficking crime. In fact, the jury instructions drew no distinction between "use" and "carry" at all.

The pre-Bailey instructions given in the case at hand conflated the definitions of "use" and "carry," and were so broad that neither party nor the jury had reason to focus on the factual issues relevant after the announcement of the *Bailey* decision. In fact, the government focused only on the location of the purse in the vehicle and made no effort to elicit whether the opening of the purse was fastened, what type of fastener it had, or where within the purse the firearm was located. The only evidence elicited on this issue was the arresting agent's admission that the purse contained numerous personal effects in addition to the firearm, and her testimony that the firearm was heavy. Given the apparent concern of post-*Bailey* decisions regarding the accessibility of the firearm itself, as distinguished from the accessibility of any container the firearm is found in, the jury not only was not provided with an accurate statement of the law to be

applied to the facts, but was not provided with sufficient facts or guidance to make the appropriate inquiry whether the firearm was in fact "immediately available for use by the defendant" rather than being in mere "proximity." Accordingly, the ruling in this case is in direct conflict with established caselaw affecting a rule in which there is an overriding need for national uniformity.

The published opinion below's application of a "harmless error" analysis to the trial court's failure to properly instruct on the law in this case is also in conflict with the Ninth Circuit's *en banc* published opinions in *United States v. Keys*, 95 F.3d 874 (9th Cir. 1996) and *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) *affirmed* ___ U.S. ___, 115 S.Ct. 2310 (1995). In *Gaudin*, the *en banc* Court stated that "[w]hen proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all." 28 F.3d at 951. In *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996) (en banc), the Court subsequently identified a distinction between cases in which "a court instructs the jury that an element of the crime has been established as a matter of law," and cases in which the trial court "simply fails to alert the jurors they must consider it." *Id.* at 866. The *en banc* Court determined that in the latter circumstance, the type of review discussed in *Carella v. California*, 491 U.S. 263, 109 S.Ct. 2419 (1989) is appropriate. Under this standard, "the omission is harmless only if review of the facts found by the jury establishes, beyond a reasonable doubt, that the jury *necessarily* found the omitted element." *Id.* at 867. (emphasis in original).

The opinion below is thus in direct conflict with *Keys* due to the Court's failure to apply the *Carella* test as applied in *Roy v. Gomez*. As recognized by the *en banc* court in *Keys*,

the *Carella* test is satisfied "*only* if the reviewing court can tell what the jury actually found, [because] *only* then can the court conclude 'beyond a reasonable doubt' . . . that the jury found the facts necessary to support the conviction." *Id.* at 867 (quoting *Carella*, 491 U.S. at 269, 109 S.Ct. at 2422) (emphasis added in Roy). If a reviewing court cannot tell what the jury actually found, because there are no findings from which a reviewing court could conclude that the jury necessarily found the omitted element, then the *Carella* harmless error analysis ends and reversal is required. *Id.* at 868.

Due to the omissions from the instructions given the jury in this case, a reviewing court cannot tell what the jury actually found, or whether they found the facts necessary to support the conviction. Because the record in this case demonstrates that the jury did not determine the issues identified in *United States v. Hernandez*, 80 F.3d 1253, 1257 (9th Cir, 1996) which are necessary to a determination whether the defendant "used" or "carried" the subject firearm during and in relation to a drug trafficking crime, "the judgment of conviction is defective no matter how strong the evidence of guilt may be." *Keys, supra.* at 882. As the Court did not apply this required standard of review, the ruling in this case creates a conflict with existing decisions of the Ninth and other circuits and this Court should grant Certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: April 15, 1997

Respectfully submitted,

ROBIN R. SCROGGIE
Attorney for Petitioner
JOSEFA FUENTES

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROLANDO LOPEZ,
Defendant-Appellant,
No. 92-50137
D.C. No.
CR-91-909-MLR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEFA FUENTES,
Defendant-Appellant,
No. 92-50145
D.C. No.
CR-91-909-MLR

ORDER AND AMENDED OPINION

On Remand from the Supreme Court of the United States

Submitted October 1, 1996*

Filed November 8, 1996
Amended December 10, 1996

Before: Jerome Farris, Diarmuid F. O'Scannlain, and Stephen S. Trott, Circuit Judges.

Opinion by Judge O'Scannlain

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. 34(a) and Ninth Cir. R.34-4.

SUMMARY

Criminal Law and Procedure/Criminal Acts

The court of appeals affirmed a judgment of conviction in part and reversed in part. The court held that a conviction for "carrying" a firearm in connection with a drug-trafficking crime is supported by evidence of a gun in a car occupant's purse on the seat within easy reach and near illegal narcotics.

Appellants Rolando Lopez and Josefa Fuentes drove to a location to sell heroin to an undercover agent of the Drug Enforcement Agency (DEA). After arresting Lopez and Fuentes, DEA agents found a handgun in Fuentes's purse, which was on the front passenger seat of the vehicle within easy reach of her and Lopez, and within one foot of a quantity of heroin. The agents went to the residence of Lopez and Fuentes, where they found more heroin, a loaded handgun, and an assault rifle.

Lopez and Fuentes were charged with conspiracy, substantive controlled-substance offenses, and two counts of using and carrying a firearm during and in connection with a drug-trafficking crime in violation of 18 U.S.C. § 924(c).

At trial, the district court instructed the jury that "use or carry" a firearm means having a firearm available to assist or aid in the commission of a charged drug crime, and that the government had to prove that the firearm was in the defendant's possession or under his/her control at the time the alleged drug-trafficking crime was committed. Lopez and Fuentes were convicted as charged. The court of appeals affirmed the convictions and sentences.

The Supreme Court vacated the judgment of the court of appeals and remanded for reconsideration in light of *Bailey v. United States*, 116 S.Ct. 501 (1995). *Bailey* held that a defendant cannot be convicted under § 924(c)(1) for "us-

ing" a firearm unless the defendant "actively employed" the firearm.

In light of *Bailey*, the government conceded that the evidence was not sufficient to support the convictions under count five for using or carrying a firearm during and relation to the crime of conspiracy to possess heroin with intent to distribute, based on the guns and drugs found at the residence. The government also conceded that to the extent the jury instructions did not restrict "use" to active employment of a firearm, they were erroneous.

[1] In order to convict a defendant under § 924(c) for "carrying" a firearm, the defendant must have *transported* the firearm *on or about his or her person*. This means that the firearm must have been *immediately available for use* by the defendant. The evidence was clearly sufficient to allow a rational trier of fact to convict Lopez and Fuentes on this definition of "carrying."

[2] The evidence was sufficient to prove beyond a reasonable doubt that Fuentes transported the gun about her person in her purse. Because the district court informed the jury that each coconspirator was liable for all acts taken by the other conspirator in the furtherance of the conspiracy, the evidence was sufficient to support Lopez's conviction under § 924A(c).

[3] The convictions on count five had to be reversed. [4] It was appropriate to remand to the district court to allow it to resentence Lopez and Fuentes.

[5] The jury instructions on the "use or carry" element were flawed. [6] The instructions failed properly to define "carry" to connote that the firearms were "*immediately* available for use" rather than merely "available to assist or aid," and consists of *transporting* the firearm "*on or about*" the person, rather than being merely "in proximity."

[7] The instructional error with respect to the "carry" element amounted to a misdescription. The error was harmless only if review of the facts actually found by the jury established that the jury *necessarily* found the misdescribed element, i.e., that Lopez and Fuentes transported the firearm "on or about" his or her person such that it was "immediately available for use."

[8] The jury necessarily found that the firearm in Fuentes's purse was in the defendants' possession or under the defendants' control at the time a drug-trafficking crime was committed as alleged. In doing so, the jury necessarily found that either Lopez or Fuentes transported the firearm "on or about" his or her person such that the firearm was "immediately available for use." No rational jury could have found that the pistol was in the defendants' possession or under their control without also finding that either Lopez or Fuentes "carried" the firearm. [9] The error in the jury instructions with respect to the "carry" element was therefore harmless.

COUNSEL

Joseph F. Walsh, Los Angeles, California for defendant-appellant Rolando Lopez. Robin R. Scroggie, Los Angeles, California, for defendant-appellant Josefa Fuentes.

Steven M. Arkow, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

ORDER

The Opinion filed November 8, 1996, is amended as follows: on slip Opinion page 14740, line 6, please insert the following footnote at the end of the first sentence:

> The Supreme Court recently rejected the Ninth Circuit's strict "harmless error" standard in habeas corpus

proceedings. *California v. Roy*, 117 S. Ct. 337 (Nov. 4, 1996). Here, the *Chapman* harmless error test is applied on direct appeal. The Supreme Court's per curiam opinion vacating *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996) (en banc), setting forth the appropriate standard, and remanding the case for further proceedings is inapplicable on these facts.

Please renumber subsequent footnotes.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the convictions for using or carrying a firearm during and in relation to a drug trafficking crime can stand in light of *Bailey v. United States*, 116 S. Ct. 501 (1995), and jury instructions which misdescribed an element of the offense.

I

This court affirmed the convictions and sentences of Rolando Lopez and Josefa Fuentes on five counts: conspiracy to distribute 270 grams of heroin in violation of 21 U.S.C. § 846 (count one); distributing twenty-five grams of heroin in violation of 21 U.S.C. § 841(a)(1) (count two);[1] possession with intent to distribute 270 grams of heroin in violation of 21 U.S.C. § 841(a)(1) (count three); using and carrying a super semi-automatic .38 caliber pistol on October 16, 1991 during and in relation to a drug trafficking crime — possession with intent to distribute — in violation of 18 U.S.C. § 924(c) (count four); and using and carrying a super semi-automatic .38 caliber pistol and loaded AK-47 rifle on October 16, 1991 during and in relation to a drug

[1] Only Fuentes was charged and convicted for distributing 25 grams of heroin in violation of 21 U.S.C. § 841(a)(1).

trafficking crime — conspiracy to possess heroin with intent to distribute — in violation of 18 U.S.C. § 924(c) (count five), *United States v. Lopez-Fuentes*, 37 F.3d 565 (9th Cir. 1994).[2]

The Supreme Court of the United States vacated that opinion and remanded the case for reconsideration in light of *Bailey*.[3] The Court held that a defendant cannot be convicted under 18 U.S.C. § 924(c)(1) for "using" a firearm unless the defendant "actively employs" the firearm. *Bailey*, 116 S. Ct. at 506. Lopez and Fuentes argue that their firearms convictions cannot stand in light of *Bailey*, both because there is insufficient evidence that they used or carried the firearms, and because the jury instructions defining "using or carrying" were improper.

II

We first address Lopez' and Fuentes' arguments concerning the validity of their firearms convictions in light of *Bailey*.

A

Lopez and Fuentes first argue that there is not sufficient evidence to support their convictions on count four for using

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[2]The full statement of facts can be found in *Lopez-Fuentes*, 37 F.3d at 567-68. We draw from that section of our previous disposition for the salient facts.

[3]As noted in *United States v. Garcia*, 77 F.3d 274 (9th Cir. 1996), we had consistently held prior to *Bailey* that "possession of gun is enough to support a conviction under section 924(c)(1) if the jury could reasonably infer that the possessed gun could have played a role in the crime." *Id.* at 277 (citations omitted). *Bailey's* contrary rule clearly constitutes a "new rule for the conduct of criminal prosecutions" in this circuit. *Cf. United States v. Lang*, 81 F.3d 955, 962 (10th Cir. 1996) ("*Bailey* announces a new rule of criminal law.").

or carrying a pistol during and in relation to their possession with intent to distribute heroin in violation of 18 U.S.C. § 924(c),[4] Lopez and Fuentes maintain that they did not "use" or "carry" the firearm in question, because they never actively employed the pistol during and in relation to the crime. We disagree.

[1] In deciding whether the evidence is sufficient to support Lopez' and Fuentes' convictions for carrying the firearm, we must review the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the "carrying" element beyond a reasonable doubt.[5] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Vgeri*, 51 F.3d 876, 879 (9th Cir. 1995). In *United States v. Hernandez*, 80 F.3d 1253, 1258 (9th Cir. 1996), our first post-*Bailey* decision to discuss the issue, we held that in order to convict a defendant under section 924(c) for "carrying" a firearm "the defendant must have *transported* the firearm *on or about his or her person.* This means the firearm must have been *immediately available for use* by the defendant." *Id.* at 1258 (emphasis added) (citing *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996), *cert. denied*, ____ S. Ct. ____, 1996 WL 337196 (Oct. 7, 1996)); *see also United States v. Willett*, 90 F.3d 404, 407 (9th Cir. 1996) ("Willett was 'carrying' a gun because he transported it 'within reach and immediately available for use.' "). When viewed in the light most favorable to the prosecution, the evidence was clearly suffi-

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[4]Section 924(c)(1) imposes additional penalties on a defendant who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm."

[5]The government properly notes that the *Bailey* Court recognized that "[t]he 'carry' prong of § 924(c)(1) . . . brings some offenders who would not satisfy the 'use' prong within the reach of the statute." *Bailey*, 116 S. Ct. at 509. Accordingly, the government restricts its analysis to the "carry" prong. We do so as well.

cient to allow a rational trier of fact to convict Lopez and Fuentes on this definition of carrying.[6]

The evidence showed that Lopez and Fuentes drove in their Ford Explorer to a Burger King parking lot to conduct a pre-arranged drug sale with undercover Drug Enforcement Agency ("DEA") agents. After Lopez and Fuentes sold the drugs to the agent, they were arrested, and the truck was searched. Agents found a loaded .38 caliber super semi-automatic pistol inside Fuentes' purse. The purse was on the front passenger seat, within easy reaching distance of Lopez and Fuentes, and less than a foot away from the 270 grams of heroin.

[2] This evidence is sufficient to prove beyond a reasonable doubt that Fuentes transported the gun about her person in her purse. Because the district court gave the jury a proper *Pinkerton*[7] instruction and informed the jury that each coconspirator was vicariously liable for all acts taken by the other conspirator in furtherance of the conspiracy, we hold that the evidence was sufficient to support Lopez' conviction under section 924(c). *Cf. United States v. Pimentel*, 83 F.3d 55, 58-59 (2nd Cir. 1996) (finding evidence sufficient to support section 924(c) conviction because proper *Pinkerton* instruction given); *United States v. Fike*, 82 F.3d 1315, 1328 (5th Cir. 1996) (same).

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[6] We have recently held that "a defendant can 'carry' a firearm in an automobile." *United States v. Staples*, 85 F.3d 461, 464 (9th Cir. 1996) ("Staples carried the firearm under *Hernandez*. The firearm was in the glove compartment, and thus 'about' his person, within reach and immediately available for use."). *Cf. United States v. Fike*, 82 F.3d 1315, 1328 (5th Cir. 1996) ("In placing a gun under the driver's seat of a car, then driving the car to another location, one has carried the gun according to the Webster's definition."); *United States v. Ramirez-Ferrer*, 82 F.3d 1149, 1153-54 (1st Cir. 1996) (a gun in a moving boat which is readily accessible is "carried" under § 924(c)).

[7] *Pinkerton v. United States*, 328 U.S. 640, 648-49 (1946).

B

[3] Lopez and Fuentes next argue that there is no evidence to support their convictions on count five for using or carrying a pistol and a rifle during and in relation to the crime of conspiracy to possess heroin with intent to distribute in violation of 18 U.S.C. § 924(c). After Lopez and Fuentes were arrested in the Burger King parking lot when they met with two informants to consummate the drug sale, the agents went to the residence of Lopez and Fuentes and found one gram of heroin and a loaded .38 caliber semi-automatic pistol in the top drawer of the dresser. Agents also found a loaded AK-47 assault rifle in the trash can in the front yard of the residence. In light of *Bailey*, the government concedes that the evidence is not sufficient to support the convictions on count five. We agree with the government that the convictions on count five must be reversed.

C

In light of its recommendation to vacate both the convictions and the twenty-year sentences on this count, the government maintains that Lopez and Fuentes should be resentenced and subjected to a two-level enhancement to their base offense level calculated for counts one (conspiracy to distribute heroin) and three (possession of heroin with intent to distribute) based on their possession of the two loaded firearms found in their residence, pursuant to U.S.S.G. § 2D1.1(b)(1).[8] We agree with the government that remanding the case for resentencing would permit a sentence that appropriately reflects the enhanced danger

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[8] "§ 2D1.1(b)(1) provides an enhancement for a person convicted of certain drug-trafficking offenses if a firearm was possessed during the offense." *Bailey*, 116 S. Ct. at 509.

posed when a defendant possesses a loaded firearm while engaged in drug trafficking. *See* 18 U.S.C. § 2106.

[4] The government may "ask the court of appeals to exercise its discretion under § 2106" to order resentencing on the counts of a defendant's sentence that were affirmed. *United States v. Minor*, 846 F.2d 1184, 1189 (9th Cir. 1988). Here, counts one and three were affirmed in our previous disposition. However, where a sentence under Chapter 2 of the United States Sentencing Guidelines is imposed in conjunction with a sentence for an underlying offense (*e.g.*, possession of heroin with intent to distribute), no specific offense characteristic for the possession, use, or discharge of a firearm (*e.g.*, § 2D1.1(b)(1)) may be applied in respect to the guideline for the underlying offense. *See* U.S.S.G. § 2k2.4 application note 2. In light of our decision to reverse Lopez' and Fuentes' convictions on count five, however, this double counting concern is eliminated on count one (conspiracy to distribute heroin) and it is appropriate to remand to the district court to allow it to resentence Lopez and Fuentes. *See, e.g., United States v. Thomas*, 93 F.3d 479, 488 (8th Cir. 1996) (vacating § 924(c) conviction and remanding for reconsideration of a two level increase under U.S.S.G. § 2D1.1(b)(1)); *United States v. Clements*, 86 F.3d 599, 600-01 (6th Cir. 1996) (same); *United States v. Lang*, 81 F.3d 955, 963 (10th Cir. 1996) (same); *United States v. Fennell*, 77 F.3d 510, 510-11 (D.C. Cir. 1996) (per curiam) (same).

We therefore affirm the sentence on count three and remand count one to the district court, which should consider whether a sentence enhancement under U.S.S.G. § 2D1.1(b)(1) is warranted.

III

Finally, Lopez and Fuentes argue that even if the evidence was sufficient to support their convictions on count

four for carrying the firearm, the convictions should be vacated because the jury instructions defining the term "use or carry" were erroneous. To the extent the jury instructions did not restrict "use" to active employment of a firearm, the government concedes that the instructions were erroneous. However, the government asserts that even if the instructions were improper, the convictions should nonetheless be affirmed, regardless of whether harmless or plain error review is applied. We agree.

[5] We are satisfied that the jury instructions given on the "use or carry" element were flawed. The jury was instructed that

> [t]he phrase "*use or carry* a firearm" means having a firearm *available to assist or aid* in the commission of a crime alleged in counts one and three of the indictment. . . . The government is not required to show that a defendant actually displayed or fired the weapon. The government is required, however, to prove beyond a reasonable doubt that the firearm was *in the defendants' possession or under the defendants' control* at the time that a drug trafficking crime was committed as alleged. . . . Finding that a defendant used or carried a firearm under 18 U.S.C. Section 924(c) does not require proof that the defendant had actual possession of the weapon, was near the weapon, displayed the weapon, or used the weapon in any affirmative manner.

[6] These instructions failed properly to define "carry" in light of *Hernandez*, 80 F.3d at 1258 (holding that "carry" connotes "*immediately* available for use" rather than merely "available to assist or aid," and consists of *transporting* the firearm "*on or about*" the person, rather than being merely in "proximity") (emphasis added).[9] First, the instructions

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[9]Similar definitions of "carry" have been adopted recently by a number of other circuit courts. *See, e.g. United States v. Ramirez-Ferrer,*

improperly conflate the terms "carry" and "use." *See, e.g., Pimentel*, 83 F.3d at 59; *Spring*, 80 F.3d at 1466. Second, to the extent the instructions define "use," they contain no requirement of "active employment," and thus conflict with *Bailey*. Third, to the extent the instructions define "carry," they do not advise the jury that carry connotes "immediately available for use" and "consists of transporting the firearm on or about the person." Accordingly, the instructions on "use or carry" element are improper.

In such circumstances, we must apply harmless error review to the "carrying" prong on these facts. *United States v. Keys*, 95 F.3d 874, 880 (9th Cir. 1996) (en banc).[10] In

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82 F.3d 1149, 1152 (1st Cir. 1996) ("Our decision in [*United States v. Manning*, 79 F.3d 212 (1st Cir. 1996), *cert. denied*, ____ S. Ct. ____, 1996 WL 375622 (Oct. 7, 1996)] limits the construction of 'carry' to situations in which the 'firearm' has been 'moved' or 'brought along to another place,' since all three parts of the definition adopted there contains this element of transportation.") (also citing *Hernandez*); *United States v. Spring*, 80 F.3d 1450, 1465 (10th Cir. 1996) ("carrying" element "involv[es] two elements: possession of the weapon through the exercise of dominion or control; and transportation of the weapon") (citing *Hernandez*), *petition for cert. filed* (June 25, 1996) (No. 95-9420); *United States v. Moore*, 76 F.3d 111, 113 (6th Cir. 1996) ("carry" means "immediate availability and physical transportation") (citing *Riascos-Suarez*, 73 F.3d at 623).

[10]Even though Lopez' counsel did not object contemporaneously to the trial court's instruction, this court reviews for reversible error, rather than plain error. *United States v. Keys*, 95 F.3d 874, 880 (9th Cir. 1996). "[W]hen faced with a 'solid wall of circuit authority' endorsing a jury instruction, no objection to that instruction need be registered in the trial court to preserve the point on appeal should that 'solid wall' suddenly crumble in the interim and render the instruction defective." *Id.* at 878. Fuentes is in a different position than Lopez, because she did in fact object to the jury instructions. Fuentes argued that the instructions were inadequate "because the jury could have convicted her on the basis of the mere presence of a firearm, which is impermissible." *Lopez-Fuentes*, 37 F.3d at 568. Therefore, plain error analysis would not have been applied in her case in any event.

Roy v. Gomez, 81 F.3d 863 (9th Cir. 1996) (en banc), we stated that the proper harmless error test to be applied on direct review of cases involving jury instructions that misdescribe an element of the offense is that outlined in Justice Scalia's concurring opinion in *Carella*, 491 U.S. at 267-73 (Scalia, J., concurring).[11] *See Roy*, 81 F.3d at 866 & 867 n.4; *id.* at 869 (Wallace, J., dissenting) ("the *Carella* concurrence explained how the *Chapman* harmless-error test is to be applied on direct appeal when the error involves a jury instruction"). Under that test, "the omission [or misdescription] is harmless only if review of the facts found by the jury establishes that the jury *necessarily* found the omitted [or misdescribed] element." *Roy*, 81 F.3d at 867 (emphasis in original). *Roy* noted that the test is based on the fundamental premise that appellate courts

> are not free to evaluate the evidence and postulate what the jury would have found if it had been properly instructed. "[T]he question is not whether guilt may be spelt out by a record, but whether guilt *has been found by a jury* according to the procedure and standards appropriate for criminal trials."

Id. at 867 (quoting *Carella*, 491 U.S. at 269) (emphasis in *Roy*); *see also Gaudin*, 28 F.3d at 951 ("Harmless error analysis focuses on the basis which the jury *actually rested* its verdict.") (citations omitted) (emphasis added). As explained by Justice Scalia, the test is also based on the premise that

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[11]The Supreme Court recently rejected the Ninth Circuit's strict "harmless error" standard in habeas corpus proceedings. *California v. Roy*, 117 S. Ct. 337 (Nov. 4, 1996). Here, the *Chapman* harmless error test is applied on direct appeal. The Supreme Court's per curiam opinion vacating *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996) (en banc), setting forth the appropriate standard, and remanding the case for further proceedings is inapplicable on these facts.

> [w]hen the . . . facts necessarily found by the jury[] are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed. The error is harmless because it is "beyond a reasonable doubt" that the jury found the facts necessary to support the conviction.

Carella, 491 U.S. at 271 (Scalia, J., concurring) (quoting *Chapman*, 386 U.S. at 24).

[7] In this case, the instructional error with respect to the "carry" element amounts to a "misdescription" of that element. Accordingly, the error is harmless only if review of the facts actually found by the jury establishes that the jury *necessarily* found the misdescribed element, i.e. only if the jury necessarily found that Lopez or Fuentes transported the firearm "on or about" his or her person such that the firearm was "immediately available for use." *Hernandez*, 80 F.3d at 1258. In determining what the jury actually and necessarily found, we "should examine those parts of the record relevant to these inquiries." *Hart v. Stagner*, 935 F.2d 1007, 1011 (9th Cir. 1991) (applying *Carella*).

[8] As noted above, the jury in this case was instructed that "use or carry" means "having a firearm available to assist or aid in the commission of a crime." The jury was told that to establish this element, the government had to prove beyond a reasonable doubt that the firearm was "in the defendants' possession or under the defendants' control at the time that a drug trafficking crime was committed as alleged." Because the jury convicted Lopez and Fuentes on the basis of these instructions, the jury necessarily found that the firearm in Fuentes' purse on the front passenger seat of Lopez' and Fuentes' truck was "in the defendants' possession or under the defendants' control at the time that a drug

trafficking crime was committed as alleged."[12] We conclude that in doing so, the jury also, necessarily found that either Lopez or Fuentes transported the firearm "on or about" his or her person such that the firearm was "immediately available for use." The firearm in this case was found in Fuentes' purse on the front passenger seat, within reaching distance of Lopez and Fuentes and less than a foot away from the 270 grams of heroin. Quite simply, no rational jury could have found that the pistol was "in the defendants' possession or under their control" without also necessarily finding that either Lopez or Fuentes "carried" the firearm (in the purse) to the truck. *See, e.g., Roy,* 81 F.3d at 867 ("The error is harmless if no rational jury would have made these findings without also finding [the challenged element].") (quoting *Martinez,* 937 F.2d at 425); *Hart,* 935 F.2d at 1012-13 (finding instructional error harmless under *Carella* because "considering the predicate facts the jury must have found to convict Hart under the instructions it was given, the jury must have necessarily found the element on which the jury instructions were incorrect").[13]

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[12] In *Roy*, we pointed out that the *Chapman* and *Carella* tests "can be met only if the reviewing court can tell what the jury actually found, since only then can the court conclude beyond a reasonable doubt that the jury found the facts necessary to support the conviction." *Roy*, 81 F.3d at 868 (citations omitted). This requirement is satisfied here, because in convicting Lopez and Fuentes on the basis of these instructions, the jury necessarily "actually found" that the weapons were "in the defendant's possession or under the defendant's control at the time the drug trafficking crime was committed as alleged."

[13] Because this court can tell from the record what the jury actually and necessarily found, the *Carella* harmless error analysis may be applied to its logical conclusion. *Keys,* 95 F.3d at 881 ("If a reviewing court cannot tell what the jury actually found, because there are no findings from which a reviewing court could conclude that the jury necessarily found the omitted element, then the *Carella* harmless error analysis ends and reversal is required.") (citations omitted).

It is, of course, theoretically possible that the jury *could* have found that the firearm in the truck was in Lopez' or Fuentes' possession or under their control without also finding that one of them carried the firearm to the truck. However, nothing in the record even remotely suggests that the jury convicted Lopez or Fuentes on the basis of such an implausible factual scenario. The mere fact that the jury theoretically could have convicted Lopez or Fuentes without finding the misdescribed element is insufficient to preclude a finding of harmlessness when a review of the factual circumstances establishes that the jury, in making the factual findings which it actually made, necessarily found the misdescribed element. *See United States v. Maloney,* 71 F.3d 645, 658 (7th Cir. 1995) (concluding that an instructional error was harmless under *Carella* test because "[a]lthough in theory a jury under this instruction could convict an individual for obstruction of justice without any evidence of a pending judicial proceeding, the factual circumstances of this case suggest that the actual verdict was not so influenced") (citing *United States v. Parmelee,* 42 F.3d 387, 393 (7th Cir. 1994), *cert. denied,* 116 S. Ct. 63 (1995)).

[9] Accordingly, we hold that the error in the jury instructions with respect to the "carry" element was harmless.

IV

For the foregoing reasons, Lopez' and Fuentes' convictions on count four are affirmed, their convictions on count five are reversed, count one is remanded for discretionary resentencing and the sentence on count three is affirmed.

AFFIRMED in part, REVERSED in part and REMANDED in part.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROLANDO LOPEZ,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEFA FUENTES,
Defendant-Appellant.

FILED
January 16, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 92-50137
D.C. No. 91-909-MLR

No. 92-50145
D.C. No. CR-91-0909-R-2

ORDER

Before: FARRIS, O'SCANNLAIN, and TROTT, Circuit Judges.

The panel has voted to deny the appellants' petitions for rehearing. Judges O'Scannlain and Trott have voted to reject the suggestions for rehearing en banc, and Judge Farris has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected.